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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT
DIVISION 4

COURT OF APPEAL- SECOND DIST.
FILED
NOV - 8 2005
JOSEPH A. LANE Clerk
Deputy Clerk

LIONEL SIMON,
Plaintiff and Appellant,
v.
SAN PAOLO U.S. HOLDING COMPANY, INC.,
Defendant and Appellant.

No. B121917
(Los Angeles County Super. Ct. No. BC152431)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard P. Kalustian, Judge. Modified, affirmed and granted.

Knapp, Petersen & Clarke, Andre E. Jardini and Mitchell B. Ludwig for Plaintiff and Appellant.

Epport, Richman & Robbins, Steven N. Richman and Lawrence A. Abelson for Defendant and Appellant.

BACKGROUND

This case has a long history. On April 8, 1998, after a second jury trial on the issue of punitive damages, judgment was entered against the defendant, San Paolo Holding Company, in favor of the plaintiff, Lionel Simon, in the amount of $1,705,000. The judgment amount consisted of $5,000 in compensatory damages and $1,700,000 in punitive damages. On August 28, 2000, we affirmed the superior court judgment. The California Supreme Court denied review. The United States Supreme Court granted certiorari, vacated our opinion, and remanded for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424. (*San Paolo U.S. Holding Co., Inc. v. Simon* (2001) 532 U.S. 1050.)

On November 7, 2001, we again affirmed the judgment, and the California Supreme Court denied review, but the United States Supreme Court again granted certiorari and vacated our second opinion, remanding for further consideration in light of *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408. (*San Paolo U.S. Holding Co., Inc. v. Simon* (2003) 538 U.S. 974.)

On December 2, 2003, we again affirmed the judgment. This time, the California Supreme Court granted review and reversed our judgment on June 16, 2005, in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159. The Court remanded with directions to modify the superior court

judgment to reduce the award of punitive damages to $50,000, and to affirm the judgment as modified. It is now before us to enter the modified judgment and to consider a motion brought by Simon pursuant to Code of Civil Procedure section 908.

Early in the appellate process, San Paolo obtained a stay of execution by posting an appeal bond, and later, a stay was granted by the United States Supreme Court. In early May 2001, after the stay was vacated and the bond had expired, San Paolo paid the original judgment, which was $2,228,889 by that time, but it did so in exchange for Simon's agreement to two conditions. Simon was to provide proof of deposit of approximately one-half the judgment amount into an insured financial institution, and he was not to transfer or dissipate the funds until the appeals were resolved and the judgment was final. There was no agreement with regard to the payment of interest on the deposited funds.

Simon complied with the conditions, but on July 3, 2001, San Paolo demanded the return of its payment, plus 10 percent interest computed from the time of payment, in exchange for posting a bond in the same amount it had previously posted. Simon refused, and sent counsel a copy of a bank statement, showing a beginning balance of $1,134,084 in Washington Mutual Bank.

On July 5, 2005, Simon tendered to San Paolo's attorneys a check in the sum of $2,156,304.20, representing restitution of the excess punitive damages, interest on the excess which had accrued to the date of payment, less the amount of Simon's reduced judgment, with costs and interest, minus an agreed credit. San Paolo rejected the tender, returned the check, demanding interest at the rate of 10 percent per annum from the time of the payment in 2001.

On July 19, 2005, Simon retendered the check, agreeing that San Paolo could negotiate it without waiving any claim it might make to interest, providing also that Simon would retain all rights with regard to the amount and circumstances of the restitution payment. San Paolo accepted the second tender on such conditions.

Simon has now filed a motion seeking a restitution order under Code of Civil Procedure section 908, including a declaration that San Paolo may not recover interest on amounts it paid to Simon on account of the original punitive damage award in excess of $50,000.

DISCUSSION

Code of Civil Procedure, section 908 provides: "When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination."

When ordering restitution after a punitive damage award is reduced, a court may, in its discretion, include interest when it is equitable to do so. (*Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1085-1086 (*Textron*).)

San Paolo contends that we have no authority to consider the motion, because, it asserts, the California Supreme Court, not this court, is the "reviewing court." In the alternative, San Paolo asks that if we decide the issue, we award it additional interest at the rate of 10 percent per annum from the time of the 2001 deposit, which would amount to more than $925,000.

San Paolo proffers no authority for its assertion that this court is not the reviewing court. A reviewing court is one with appellate jurisdiction, and may be the appellate department of a superior court, the Court of Appeal, or the Supreme Court. (See *Leone v. Medical Bd. of Cal.* (2000) 22 Cal.4th 660, 666.) The statute permits the reviewing court, upon reversal *or modification*, to order restitution on reasonable terms and conditions, and to take evidence and make findings. (Code Civ. Proc., § 908.) The Supreme Court did not do so upon reversal, and there is no language in the statute indicating any legislative intent to limit this reviewing court from doing so upon modifying the judgment.

San Paolo also contends that we should decline to consider Simon's motion, leaving it instead to the trial court, because it requires a factual determination.

Under the plain language of the statute, the taking of evidence is a matter of discretion with the reviewing court. (Code Civ. Proc., § 908.) Of course, an appellate court may refer the matter to the trial court in appropriate cases, such as those that "would involve the taking of an account and the trial of many issues of fact which would be raised during the course of such accounting." (*Stockton Theatres, Inc. v.*

Palermo (1953) 121 Cal.App.2d 616, 624.)[1]

In another context, it has been observed that when the facts are presented in declarations, rather than live testimony, the appellate court is in a no worse position than the trial court to evaluate them. (See *United Farm Workers National Union v. International Brotherhood of Teamsters* (1978) 87 Cal.App.3d 225, 233.) There has been no suggestion here that live testimony is necessary, and there are few factual issues to consider. The evidence consists primarily of the attorneys' letters to one another, and there is no claim that they are not authentic or that they present material conflicts.[2]

The purpose of the appellate court's power to make a final determination of the rights of the parties by modifying and affirming the judgment is to avoid subjecting the parties to any further delay or expense. (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1170.) The appellate court's express statutory authority under section 908 to determine restitution and the conditions of restitution serves this purpose by disposing the matter without further proceedings in the trial

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[1] In its Objection and Response to Reply etc., San Paolo suggests that an accounting is necessary to show that Simon did not keep the funds in a financial institution as agreed, that Simon used the funds for his purposes, and that he did not earn as much interest on the funds as he could have. But San Paolo also concedes that Simon's use of any of the funds is irrelevant to the motion.

[2] Simon's motion is supported by two declarations, his attorney's and his own. San Paolo objects to portions of Simon's own declaration, which is largely argumentative and irrelevant. We therefore sustain San Paolo's objection on those grounds, except its objection to Simon's statement in paragraph No. 7 that he never used the money, and kept it at all times in a savings account as required by San Paolo, and to his statement in paragraph No. 8 that the funds earned interest at an average rate of 1.938 percent. With regard to those two statements, the objection is overruled.

court, which might then result in another appeal. (See Code Civ. Proc., § 909.)

Our discretion should be exercised so that the parties are "returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment...." (Code Civ. Proc., § 908.) Satisfying San Paolo's demand would leave it with a judgment of nearly one million dollars, clearly not its position prior to the satisfaction of the judgment.

San Paolo suggests that it would be inequitable if it were not compensated for the loss of use of its money when it paid the judgment only because Simon threatened to execute on the judgment. (See, e.g., *Textron, supra,* 118 Cal.App.4th at p. 1086.)

When this motion reached us, we asked the parties to provide letter briefs informing the court whether San Paolo was entitled to the protection of 12 United States Code section 91 ("section 91"), which provides in relevant part that "no attachment, injunction, or execution, shall be issued against [a national banking] association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." As a foreign bank, San Paolo Bank is not a national bank, but if it is licensed by the United States Comptroller of the Currency, it is entitled to the same privileges as a national bank. (12 U.S.C. § 3102(b); see generally, *U.S. v. Lewis* (9th Cir.1995) 67 F.3d 225, 230-231 [statute provides foreign banks with "national treatment"].)

Section 91 prohibits the "seizure of the property of a national bank before a judgment against that institution ha[s] completed the appellate process." (*U.S. v. Lemaire* (5th Cir.1987) 826 F.2d 387, 390, cert. den. (1988) 485 U.S. 960.)

Thus, no writ of execution shall issue nor abstract recorded in aid of execution of a money judgment against a national bank. (*United States v. F.D.I.C.* (5th Cir.1989) 881 F.2d 207, 209-210, cert. den. (1990) 493 U.S. 1072.) Similarly, a national bank is not required to post a bond to stay execution. (See *In re Richmond Produce Co., Inc.* (N .D.Cal.1996) 195 B.R. 455.)

If San Paolo was entitled to the benefits of section 91, its payment of the judgment may have been voluntary and unnecessary, apparently done for the purpose of eliminating the risk of owing Simon interest upon nearly $2 million at the rate of 10 percent per annum calculated over several years. Costs made unnecessary by 12 United States Code section 91 may not be recoverable. (See *Jewell v. Bank of America* (1990) 220 Cal.App.3d 934, 938, 940-941 [bond costs recoverable only because they were incurred prior to construction of section 91 by *U.S. v. Lemaire, supra*, 826 F.2d 387, as prohibiting execution].)

Unfortunately, the further briefing on the issue was not dispositive. We thus turn to whether it would be equitable to allow an award of interest to San Paolo.

As Simon points out, he obtained a judgment for punitive damages in the sum of $1,700,000, and during the ensuing seven years involving four appellate proceedings, there was never any certainty about how much, if any, would have to be restored. Thus, any award of interest to San Paolo is best compared to prejudgment interest.[3]

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[3] The 10 percent San Paolo demanded is the amount that accrues upon judgments. (See Code Civ. Proc., § 685.010.) Otherwise, the maximum permissible interest rate is seven percent. (Cal. Const., art. XV, § 1.)

Prejudgment interest may be recovered from a tortfeasor from the date when the damages are readily ascertainable. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 798; Civ.Code, § 3287.) It is not allowable when the amount of the damages is not readily ascertainable, but must be resolved by accord, verdict, or judgment. (*Lineman v. Schmid* (1948) 32 Cal.2d 204, 209.) Prejudgment interest is in the nature of damages. (*Id.* at p. 212.) It is meant to compensate the *tort* "plaintiff for the loss of *calculable* funds that belonged to the plaintiff, or should have been paid to the plaintiff. [Citations.]" (*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1997) 60 Cal.App.4th 13, 21, italics added.)

San Paolo attempts to paint Simon with the same brush as tortfeasors upon whom prejudgment interest may be imposed. It contends that it had to pay the judgment, because Simon refused to accept a bond. San Paolo's own evidence in opposition to the motion casts doubt on this contention. In its letter dated July 3, 2001, to opposing counsel, it agreed to post a bond in the same amount as previous bonds, but only in exchange for the return of the judgment amount paid by San Paolo *plus 10 percent interest* from the date of payment.

San Paolo also suggests that Simon *wrongfully* refused to make restitution upon reversal of the judgment. But when Simon attempted to make restitution, San Paolo rejected the tender, returned the check, and demanded interest, again at the rate of 10 percent per annum. It appears that Simon's "refusal" to restore the excess over the reduced judgment was a refusal to accede to San Paolo's demand for interest, without which the parties might have agreed upon a bond.

Relying on *Textron, supra*, 118 Cal.App.4th at pp. 1085-1086, San Paolo contends that it is *entitled* to interest.

There was no such holding in *Textron*, which was, as we read it, an observation that denying interest would be inequitable if based *solely* upon consideration of the defendant's conduct that gave rise to liability. (*Ibid.*) We have no quarrel with that observation. To the extent the court may have meant that it is necessarily inequitable to deny a defendant interest on remitted punitive damages, we disagree.[4]

A restitution order under Code of Civil Procedure section 908 must return the parties so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. San Paolo may have lost the use of the money, but it has not shown what it might have earned in the market. Further, San Paolo's claimed inability to post a bond was due only to its own insistence upon the condition of payment by Simon of interest. And payment benefited San Paolo by eliminating the risk it may have had to pay interest for a number of years.

As additional direct authority for its demand for interest at 10 percent, San Paolo cites Code of Civil Procedure section 701.680, subdivision (b), which provides: "If the judgment is reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the judgment with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment." This section provides for restitution when a judgment debtor's property has been sold at an execution sale, and cannot, therefore, be returned. No

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[4] There is no suggestion in *Textron* that 10 percent would be an appropriate rate, should interest be allowed. Here, the interest actually earned on the deposit was less than two percent, and the maximum legal rate on a debt not reduced to judgment is seven percent. (See Cal. Const., art. XV, § 1; Code Civ. Proc., § 685.010.)

property has been seized under a writ of execution or sold in this case. San Paolo's proffered authority is inapplicable.

Thus, we reject San Paolo's contention that it is *entitled* to interest. And despite broad or ambiguous language in *Textron, supra*, 118 Cal.App.4th at p. 1086, we conclude that the equities disfavor an award of interest in this case, where Simon remains the prevailing party, remains entitled to punitive damages, albeit a reduced amount, and has not engaged in unreasonable or overreaching conduct in the collection of the original judgment.

Without such circumstances, the comparison to prejudgment interest is the most apt here. Such interest is in the nature of damages. (*Lineman v. Schmid, supra*, 32 Cal.2d at p. 209.) No salutary purpose would be served by imposing interest as *damages* upon Simon, the injured plaintiff in this action, particularly upon an uncertain sum on which *Simon* would not have been able to recover prejudgment interest, since prejudgment interest is not allowed on punitive damages. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 662, 664.)

Nor would Simon have been able to recover prejudgment interest on compensatory damages, unless such damages were subject to calculation. (See *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc., supra*, 60 Cal.App.4th at p. 21.) Here, the amount to be restored was not calculable prior to the reversal by the California Supreme Court, and once it was calculable, Simon tendered it prior to the court's issuance of the remittitur on July 21, 2005.

We conclude that so far as possible, Simon's tender of July 15, 2005, in the amount of $2,156,304, returned the parties to the positions they occupied before San Paolo's payment of the

judgment. (Code Civ. Proc., § 908.) We shall therefore grant Simon's motion and declare that San Paolo is not entitled to recover interest on restored funds.

DISPOSITION

The portion of the superior court judgment awarding plaintiff punitive damages is modified to reduce the award to $50,000. As so modified, the judgment is affirmed. Simon's motion pursuant to Code of Civil Procedure section 908 is granted. Simon's obligation to restore excessive punitive damages to San Paolo has been satisfied. No additional amount is owing. Each party shall bear its own costs on appeal.

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HASTINGS, J.

We concur:

EPSTEIN, P.J.

CURRY, J.